91-854

Supreme Court, U.S.
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No. 91 -

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES GOMEZ and CHARLES MARSHALL,

Petitioners,

v.

EUGENE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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QUESTION PRESENTED

Whether the due process requirement of an impartial decisionmaker permits a prison disciplinary hearing on a written misconduct report to be conducted by a supervisory prison official who neither reports nor investigates the matter, but who reviews and classifies the misconduct report as "serious" or "administrative" for the purpose of notifying the prisoner of the possible consequences of the hearing and of his rights in the hearing process.

LIST OF PARTIES

Petitioners are James Gomez, the Director of the California Department of Corrections, and Charles Marshall, Warden of Pelican Bay State Prison at Crescent City, California. Respondent is Eugene Hamilton, a state prisoner who was confined at the California State Prison at Corcoran at the time he filed his petition for writ of habeas corpus in state court, and who is now confined at Pelican Bay State Prison.

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No. 91 -

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October Term, 1991

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v.

EUGENE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

Petitioners, James Gomez, Director of the California Department of Corrections, and Charles Marshall, Warden of Pelican Bay State Prison at Crescent City, California, pray that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Fifth Appellate District, filed in this proceeding on June 6, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, is reported at 230 Cal.App.3d 1592, 281 Cal.Rptr. 900 (1991), and is reprinted in the Appendix submitted with this petition (Appendix, pp. 1-9).

The state trial court's order granting Hamilton habeas corpus relief was not reported. It is reproduced in the Appendix (Appendix, pp. 12-13).

JURISDICTION

The Court of Appeal of the State of California, Fifth Appellate District, filed its opinion on June 6, 1991. The state appellate court denied petitioners' petition for rehearing on June 28, 1991 (Appendix, p. 10).

On August 22, 1991, the Supreme Court of California denied petitioners' petition for discretionary review of the state appellate court's decision (Appendix, p. 11). This petition is timely filed within 90 days of that date.

The jurisdiction of this Court to review the decision of the Court of Appeal of the State of California, Fifth Appellate District, is invoked under 28 United States Code section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Const., amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code section 2932 (c)(1)(A):

This statute provides in pertinent part, "the [prison disciplinary] hearing shall be conducted by an individual who shall be independent of the case and shall take place within 30 days of the notice."

California Code of Regulations, title 15, sections 3312, 3313, 3314, 3315, 3318 and 3320:

These administrative regulations, promulgated under the state Administrative Procedures Act, are set forth in the Appendix at pages 14-34.

STATEMENT OF THE CASE

On March 21, 1989, R. Ortiz, a correctional officer at the Correctional Training Facility at Soledad, California, charged inmate Eugene Hamilton with "battery on a correctional peace officer" in a prison misconduct report. The charge arose out of an altercation between Officer Ortiz and Hamilton, who became upset during a routine search of his cell. When Officer Ortiz tried to restrain Hamilton, he repeatedly poked the officer on the chest. Hamilton also tried to punch the officer and later struck him in the chest with a forearm.

As required by an administrative regulation, California Code of Regulations, title 15, section 3312 (e)(Appendix, p. 15), Correctional Lieutenant Hopkins reviewed Officer Ortiz's written misconduct report before its issuance to Hamilton. She changed the description of the charge to "physical assault on staff." This editorial change did not alter the nature of the charge against Hamilton or its consequences. Lieutenant Hopkins did not witness or investigate the incident that led to the assault charge.

As the reviewing officer, Lieutenant Hopkins was also required to classify Hamilton's misconduct charge as "serious" or "administrative" under California Code of Regulations, title 15, section 3313 (a) (Appendix, p. 16). A serious misconduct charge exposes an accused prisoner to greater penalties, including the possible forfeiture of sentence reduction credits. A "serious" classification also entitles the accused prisoner to additional procedural safeguards in the disciplinary hearing process.

Lieutenant Hopkins classified the charge as "serious" under the criteria prescribed in California Code of Regulations, title 15, sections 3314 and 3315 (Appendix, pp. 18-26). The criteria set out in these regulations limit the reviewing officer's discretion to determine whether a misconduct charge is "serious" or "administrative".

On April 5, 1989, Lieutenant Hopkins presided at Hamilton's prison disciplinary hearing.[1] The vast majority of disciplinary hearings are conducted by individual hearing officers. She found Hamilton guilty of the assault on staff charge. She ordered a forfeiture of 150 days of sentence reduction credits as a penalty.

In January 1990, following exhaustion of his administrative remedies, Hamilton, who was then confined at the California State Prison at Corcoran, filed a petition for writ of habeas corpus in state court. His petition challenged the finding of guilt in his prison disciplinary hearing, and specifically challenged the impartiality of his disciplinary hearing officer, Lieutenant Hopkins. Hamilton contended that due process required Lieutenant Hopkins's disqualification. Hamilton's petition sought judicial reversal of the guilty finding, expungement of the record of the disciplinary hearing and restoration of forfeited sentence reduction credits.

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[1]California prison regulations permit disciplinary charges to be adjudicated by a qualified hearing officer of sufficient rank or by a disciplinary committee. Cal. Code Regs., tit. 15, § 3315(c) (Appendix, p. 24). The vast majority of disciplinary hearings are conducted by individual hearing officers.

Prison officials responded to Hamilton's habeas corpus petition. They alleged and argued that Lieutenant Hopkins did not have any bias toward Hamilton or any predetermined belief about Hamilton's guilt. Prison officials contended that Lieutenant Hopkins was sufficiently impartial to preside at Hamilton's disciplinary hearing.

On May 16, 1990, the state superior court filed an order granting Hamilton's habeas corpus petition. The superior court found that Lieutenant Hopkins should not have presided at Hamilton's disciplinary hearing, because she had previously reviewed the written misconduct report to determine whether the charge accurately reflected the underlying facts. The superior court's order required prison officials to set aside the finding of guilt, but permitted them to conduct a rehearing of the charge. Absent a rehearing, prison officials were ordered to restore to Hamilton any forfeited sentence reduction credits and all disabilities suffered by him as a result of the finding of guilt (Appendix, pp. 12-13).

Prison officials conducted a rehearing. They again found Hamilton guilty of the assault charge. Because the superior court's order directly affected a policy and practice of the California Department of Corrections, prison officials also appealed the order granting Hamilton's habeas corpus petition.[2/]

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[2]The rehearing of Hamilton's assault charge does not make this case moot. The situation is likely to recur, because administrative regulations with the force of statutes continue to require supervisory review and

The Court of Appeal of the State of California, Fifth Appellate District, affirmed the superior court's order. The state appellate court found that the due process requirement of an impartial hearing officer required Lieutenant Hopkins's disqualification as the hearing officer on Hamilton's assault on staff charge. The appellate court ruled that Lieutenant Hopkins's evaluation of the written misconduct report and her classification of the report as serious put her "in a prosecutorial role, i.e., a decisionmaking role in connection with the charge" (Appendix, p. 8). The state court of appeals found that Lieutenant Hopkins became involved in the reporting of Hamilton's rule violation when she changed the description of the charge from "battery on a correctional peace officer" to "physical assault on staff." (Appendix, p. 8-9).

At each stage of the state court proceedings, prison officials raised the claim that the federal due process dictates for prison disciplinary hearings did not require disqualification of Lieutenant Hopkins. Their sole pleading in the state trial court, a return to an order to show cause, contended that Lieutenant Hopkins was sufficiently impartial to satisfy the due process requirement of an impartial arbiter for Hamilton's disciplinary hearing.

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classification of misconduct reports by an official of sufficient rank to preside at a disciplinary hearing and because an official interpretation of the regulations states that an official who reviews the report of a charge or classifies it as serious or administrative is not barred from later presiding at a disciplinary hearing on the same charge (Appendix, pp. 35-36).

In the state appellate court, prison officials' briefs asserted that neither state statutes and regulations nor principles of federal due process required the disqualification of Lieutenant Hopkins for bias. In support of their contention that federal due process dictates did not require Lieutenant Hopkins's disqualification, prison officials relied on several lower federal court decisions addressing issues concerning the impartiality of prison disciplinary hearing officers.

Both the state trial court and the state court of appeal rejected prison officials' due process claims. Although the state appellate court noted state statutory and regulatory law requiring independent hearing officers, the court did not base its decision on these provisions. In fact, the state court of appeal found the disciplinary hearing officer's conduct to be in compliance with the administrative regulation governing disqualification. The state court ruled, however, that "due process" required her disqualification (Appendix, p. 9).

REASONS FOR GRANTING THE WRIT

1. THE STATE COURT OF APPEAL'S DISQUALIFICATION OF A PRISON DISCIPLINARY HEARING OFFICER FOR AN APPEARANCE OF BIAS BASED ON HER REVIEW AND CLASSIFICATION OF A WRITTEN MISCONDUCT REPORT RAISES AN IMPORTANT ISSUE ABOUT THE DUE PROCESS REQUIREMENT OF AN IMPARTIAL PRISON DISCIPLINARY HEARING ARBITER.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court set forth the due process dictates for prison disciplinary proceedings involving the forfeiture of statutory sentence reduction credits. *Wolff* acknowledged that due process requires an impartial arbiter in these proceedings. There, this Court declined to rule that a disciplinary hearing committee composed of state prison officials was not sufficiently impartial to satisfy due process. The record in *Wolff* contained no reason for concluding that the committee "present[ed] such a hazard of arbitrary decisionmaking that it should be held violative of due process of law." *Id.* at 571. *Wolff* did not, however, provide any standards for determining whether a particular prison disciplinary hearing board or officer was sufficiently impartial to satisfy due process. This case shows the need for further guidance on this issue.

The state court of appeal ruled that due process required disqualification of a prison disciplinary hearing officer who had reviewed and amended the charge in a misconduct report, then classified the charge as serious, and later adjudicated it. The state appellate court did

not find any evidence of actual bias. The court did not find that the hearing officer had any personal or pecuniary interest in the outcome of the hearing. The court did not find that the hearing officer had any predetermined belief of the accused prisoner's guilt or any personal knowledge of the facts leading to the charge against him.

Instead, the state appellate court characterized the hearing officer's preliminary review, amendment of the charge and classification of the misconduct report as "a decisionmaking role in connection with the charging." It also held that the hearing lieutenant became involved in reporting the rule violation simply by amending the description of the misconduct charge. The court concluded that the hearing officer's "substantial involvement in the circumstances underlying the charge" required her disqualification. This conclusion rests on the shaky foundation of an appearance of bias.

The state appellate court's disqualification of the prison disciplinary hearing officer for an appearance of bias raises an important question about the reach of this Court's decision in *Wolff*. That question is under what circumstances a prison disciplinary hearing officer's conduct in other required roles "presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law." *Id.* at 571.

Resolution of this important question of federal law will aid the proper processing of prison disciplinary charges and shed needed light on *Wolff*. As this Court has done at least twice in the past, *Ponte v. Real*, 471 U.S. 491, 492 (1985); *Baxter v. Palmigiano*, 425 U.S. 308, 310 (1976), it should grant the petition and determine whether

the state appellate court went further than *Wolff*'s imprecise pronouncement on the subject of impartial prison disciplinary hearing officers.

2. THE STATE COURT OF APPEAL'S DISQUALIFICATION OF THE PRISON DISCIPLINARY HEARING OFFICER ON DUE PROCESS GROUNDS DECIDED AN UNSETTLED QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.

The state appellate court found that available authorities did not specifically address the issue it decided. The appellate court then concluded that due process required the disciplinary hearing officer's disqualification, because of her "substantial involvement in the circumstances underlying the charge" and her "decisionmaking role in connection with the charging." This conclusion conflicts in principle with analogous precedent setting forth standards for disqualification of administrative hearing officers. The fair and efficient functioning of prison disciplinary proceedings compels conformance of the state appellate court's ruling to this precedent.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court reiterated that due process does not prohibit members of an administrative agency from investigating facts, initiating proceedings and making the necessary adjudications. *Id.* at 46-55. As *Withrow* observed, *id.* at 47-50, this Court has "squarely rejected" in several contexts claims that the combination of investigative and

adjudicative functions necessarily creates an unconstitutional risk of bias in administrative hearings.

In *FTC v. Cement Institute*, 333 U.S. 683 (1948), due process did not require disqualification of the Federal Trade Commission from adjudications of unfair competition and price discrimination charges against cement manufacturers and distributors, even though it was assumed that the Commission, as a result of its earlier investigation, had formed an opinion about the unlawfulness of the challenged cement industry practices. *Id.* at 700-703. None of this Court's decisions required it to hold "that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." *Id.* at 702-703. The same was held necessarily true for the Commission. *Id.*

In *Richardson v. Perales*, 402 U.S. 389 (1971), this Court rejected a due process challenge to a Social Security system permitting a hearing examiner to develop the facts of a disability claim and then to rule on it. There, the Court stated:

> Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The Social Security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.

Id. at 410.

More recently, in *Hortonville Joint School District v. Hortonville Education Assn*, 426 U.S. 482 (1976), striking teachers dismissed by a school board contended that its participation in labor negotiations, which provided the board with information about the reasons for the teachers' strike, made it unconstitutionally biased. The teachers argued that they were entitled to have their termination decisions made by a body other than the school board. This Court rejected the teachers' claim. *Hortonville* held that due process did not require disqualification of a school board from teacher dismissal hearings, simply because of the board's involvement in events that led to the dismissal proceedings. *Id.* at 496-497.

The lesson of these precedents is that administrative bodies may investigate, initiate and adjudicate charges without offending the requirements of due process for administrative proceedings. These cases establish that a physician may have his license to practice medicine suspended, *Withrow v. Larkin*, 421 U.S. at 40-41, a teacher may be fired, *Hortonville Joint School District v. Hortonville Education Assn.*, 426 U.S. at 485, and a Social Security claimant may have his disability claim denied, *Richardson v. Perales*, 402 U.S. at 396-397, by administrative arbiters allegedly much more involved in the underlying facts adjudicated by them than the prison disciplinary hearing officer in this case.

The state court of appeal's due process ruling

results in an ironic anomaly. Under that ruling, a prisoner entitled only to minimal procedural safeguards in a prison disciplinary hearing is granted greater due process protection from even the appearance of bias in a hearing officer than aggrieved parties in other, more formal, administrative proceedings attended by greater procedural safeguards. In other words, because of their status as prisoners, inmates accused of misconduct are entitled to easier disqualification of hearing officers. This anomaly needs correction.

California prisons now confine more than 100,000 prisoners. California prison officials conduct thousands of prison disciplinary hearings each year. Other state prison systems conduct thousands more. The orderly, efficient administration of state prison disciplinary systems should not be subject to disruption by the generous due process disqualification standard fashioned by the state appellate court in this case.

The time has come to fill in the gap left open in *Wolff*. State and lower federal courts need guidance on this issue. This Court should make clear that the due process requirements for impartial hearing officers or boards in prison disciplinary proceedings are similar to, and certainly not greater than, those for more formal administrative proceedings. The unsettled question of the standards for disqualification of prison disciplinary arbiters should be resolved in a manner that conforms to

analogous precedents. Because the state appellate court's ruling conflicts in principle with those precedents, plenary review of its decision is compelled.

CONCLUSION

For the stated reasons, petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

DATED: November 14, 1991

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of the State of California

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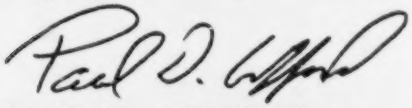
Deputy Attorney General



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No. 91 -

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES GOMEZ and CHARLES MARSHALL,

Petitioners,

v.

EUGENE HAMILTON,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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[Filed June 6, 1991]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

F014127
(Super. Ct. No. 0360-A)

THE PEOPLE,

Plaintiff and Appellant,

v.

THE SUPERIOR COURT OF KINGS COUNTY,

Respondent;

EUGENE HAMILTON,

Real Party in Interest and Respondent.

OPINION

APPEAL from an order of the Superior Court of Kings County. Peter M. Schultz, Judge.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Richard B. Iglehart, Chief Assistant Attorney General, Morris Lenk and Paul D. Gifford, Deputy Attorneys General, for Plaintiff and Appellant.

No appearance for Respondent Superior Court of Kings County.

Michael Satris, under appointment by the Court of Appeal, for Real Party in Interest and Respondent.

STATEMENT OF THE CASE AND FACTS

Real party in interest and respondent, Eugene Hamilton, a state prisoner, was charged with "battery on a correctional peace officer." Officer R. Ortiz prepared a rules violation report (CDC form 115) charging this offense after Hamilton repeatedly poked Officer Ortiz and then hit the officer on the chest. Correctional Lieutenant Hopkins, as the acting program administrator, reviewed the rules violation report as required by California Code of Regulations, title 15, section 3312, subdivision (e). Lieutenant Hopkins changed the charge to "physical assault on staff" and classified the charge as a "SERIOUS - DIVISION 'B'" rule violation.

Lieutenant Hopkins presided at Hamilton's disciplinary hearing and found Hamilton guilty of the assault charge. She imposed a forfeiture of 150 days of Hamilton's time credits, the maximum days credit loss specified for a serious Division "B" rule violation. (Cal. Code Regs., tit. 15, § 3323, subd. (e).)

Hamilton filed a petition for writ of habeas corpus in the superior court challenging the disciplinary hearing on the ground that he was denied an impartial hearing officer. The trial court granted Hamilton's petition and ordered that the findings made at the disciplinary hearing be set aside. However, the court authorized the prison

officials to conduct a new disciplinary hearing on condition that it be held timely and before a neutral and detached official. The Attorney General has appealed the ruling that Lieutenant Hopkins was barred from conducting the disciplinary hearing.

At a rehearing, Hamilton was again found guilty of the assault charge. Nevertheless, both the Attorney General and Hamilton have requested that this case not be dismissed for mootness contending the issue is important and is likely to recur.

The court may decide a petition for writ of habeas corpus even if it becomes moot during its pendency if it involves an issue of important public interest which is likely to recur. (In re Head (1983) 147 Cal.App.3d 1125, 1130.) Since this issue affects the right of procedural due process accorded to prisoners, it is of important public interest. (Ibid.) The required involvement of supervisory staff members at different stages of disciplinary proceedings makes it likely this issue will recur. A rules violation report must be reviewed by the reporting employee's supervisor and the disciplinary hearing for a serious rules violation must be conducted by a supervisory staff member who has attained a certain employment level. (Cal. Code Regs., tit. 15, §§ 3312, subd. (e), 3315, subd. (c).) Thus we deem it appropriate to resolve this issue despite its mootness in the present proceeding.

DISCUSSION

Whether the prison official who reviews a rules violation report to classify the charge as either administrative or serious and to correct the report, if necessary, is barred from conducting the disciplinary hearing on that report.

Although a prisoner's rights are diminished, the prisoner is not wholly stripped of constitutional protections when imprisoned for crime. (Wolff v. McDonnell (1974) 418 U.S. 539, 555.) Prisoners retain rights under the due process clause, including the right to be heard by an impartial disciplinary committee. (Id. at pp. 556, 570-571.) However, prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. (Id. at p. 556.)

Penal Code section 2932, subdivision (c)(1)(A) requires that a prison disciplinary hearing "be conducted by an individual who shall be independent of the case . . . ." The Department of Corrections has promulgated California Code of Regulations, title 15, section 3320, subdivision (g) to promote this requirement. That regulation provides:

> "Employees who reported the rule violation, or who supplied supplemental reports to the rule violation report, or who observed the alleged violation, or investigated the alleged misbehavior or assisted the inmate in preparing for the hearing, or for any other reason have a predetermined belief that the inmate is

> guilty or innocent will not sit as a fact finder in a disciplinary hearing nor be present while the fact finders are conducting deliberations to decide guilt or innocence and the appropriate disposition if the inmate is found guilty."

This regulation does not specifically disqualify an employee in Lieutenant Hopkins's position, i.e., an employee who reviews the report and classifies the violation before the disciplinary hearing takes place. As noted by the Attorney General, the courts give great deference to the construction of a statute by the administrative body charged with its enforcement and interpretation unless that construction is clearly erroneous or unauthorized. (In re Semons (1989) 208 Cal.App.3d 1022, 1028.) The Attorney General argues that, since this regulation was complied with, Hamilton's due process right to an impartial hearing officer was protected and the trial court erred in ruling Lieutenant Hopkins improperly sat as the hearing officer.

Despite the apparent compliance with California Code of Regulations, title 15, section 3320, subdivision (g), the trial court found that Lieutenant Hopkins was not such a neutral and detached persons is required to be the hearing officer because of her participation in reviewing the case. The trial court relied on Clutchette v. Procunier (9th Cir. 1974) 497 F.2d 809. The Clutchette court, recognizing that the right to be heard by an impartial disciplinary committee is basic to an accused prisoner's constitutional guaranty of an accurate and fair fact finding determination, stated:

"'[P]ersonal knowledge of, and sometimes

> bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude toward the [disciplinary committee]' may affect the decisions of any prison administrator or staff member sitting on a disciplinary committee. [Citation.] And it is likely that most prison officials will have some awareness of at least the more significant disciplinary problems which have arisen within the institution. Nevertheless, provided that no member of the disciplinary committee has participated or will participate in the case as an investigating or reviewing officer, or either is a witness or has personal knowledge of material facts related to the involvement of the accused inmate in the specific alleged infraction (or is otherwise personally interested in the outcome of the disciplinary proceeding), a hearing board comprised of prison officials will satisfy the due process requirement of a '"neutral and detached" hearing body.'" (Clutchette v. Procunier, supra, 497 F.2d 809, 820, emphasis added.)

The Attorney General argues the court's reference to a "reviewing officer" pertains to the employee who reviews a disciplinary hearing decision, not the employee who undertakes an initial, cursory review of the accuracy and correctness of a misconduct report. However, the Clutchette court was merely defining the minimum procedural safeguards that are required in prison disciplinary proceedings. The disciplinary procedure at issue in that case did not include a prehearing review by a supervisor. Thus, the court's language should be read as a general guideline, not a definitive determination of

whether a prehearing review disqualifies an employee. As noted by the Clutchette court, the requisites of due process vary according to specific factual contexts. (Clutchette v. Procunier, supra, 497 F.2d 809, 816.)

In Meyers v. Alldredge (3rd Cir. 1974) 492 F.2d 296, relied on in part by Clutchette v. Procunier, supra, the court set forth its parameters for a neutral disciplinary committee as follows:

> "[W]e emphasize that the requirement of an impartial tribunal prohibits only those officials who have a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role, in the circumstances underlying the charge from sitting on the disciplinary body. This would normally include only those such as the charging and the investigating staff officers who were directly involved in the incident. It would not include those who are only tangentially affected by the alleged misconduct, such as prison officials who may have some administrative connection with such misconduct prior to hearings." (Meyer v. Alldredge, supra, 492 F.2d at p. 306, fn. omitted.)

Again, in Meyers v. Alldredge, supra, the court was not evaluating a disciplinary hearing procedure which included a prehearing review such as the one required by California Code of Regulations, title 15, section 3312. Similarly, in the Florida cases relied on by the Attorney General, there is no indication of the existence of any prehearing review and evaluation. (Myers v. Askew (Fla.App. 1976) 338 So.2d 1128; Piccirillo v. Wainwright

(Fla.App. 1980) 382 So.2d 743.) Thus, the authorities relied on by the parties do not specifically address the issue here. This court must therefore determine whether, by virtue of reviewing a rules violation report, correcting the report to reflect the proper charge, and classifying the violation as administrative or serious, Lieutenant Hopkins directly and substantially participated or only tangentially participated in the case before the hearing.

The Attorney General characterizes Lieutenant Hopkins's involvement as administrative. The Attorney General argues that United States ex rel. Silverman v. Com. of Pa. (W.D.Pa. 1981) 527 F.Supp. 742 supports this position. There, the court held that a correctional officer who signed a misconduct report while on duty was not disqualified from participating as a member of the disciplinary committee. (Id. at p. 749.) An administrative directive required that misconduct reports be signed by the ranking officer on duty. However, there was no indication that the correctional officer had any input except for signing the report. The court noted the officer did not sign the misconduct report as "'the staff member reporting misconduct.'" (Ibid.)

In contrast here, Lieutenant Hopkins was required to evaluate the report to assure that the proper charge was reflected and to classify the violation as serious or administrative. This review put Lieutenant Hopkins in a prosecutorial role, i.e., a decisionmaking role in connection with the charging. Also, by making corrections to the rules violation report, Lieutenant Hopkins became involved in reporting the rule violation. Such an active role in preparing the rules violation report must be

characterized as a substantial involvement in the circumstances underlying the charge. Thus, despite Lieutenant Hopkins's apparent compliance with the California Code of Regulations, title 15, section 3320, subdivision (g), due process required that she be disqualified from hearing this case.

DISPOSITION

The order is affirmed.

(signature)
Best, P.J.

WE CONCUR:

(signature)
Martin, J.

(signature)
Thaxter, J.

[June 28, 1991]

No. F014127

(Supr. Ct. No. 0360-A)

In The

COURT OF APPEAL OF THE STATE OF CALIFORNIA

In and For The

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

THE SUPERIOR COURT OF KINGS COUNTY,

Respondent,

EUGENE HAMILTON,

Real Party in Interest and Respondent,

ORDER DENYING PETITION

Appellant's petition for rehearing in the above matter is hereby denied.

Dated: June 28, 1991

BEST
P.J.

WE CONCUR:

MARTIN
J.

THAXTER
J.

[August 22, 1991]

No. F014127

FIFTH APPELLATE DISTRICT
S021944

In The

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Appellant

v.

KINGS COUNTY SUPERIOR COURT, Respondent

EUGENE HAMILTON, Real Party In Interest

Appellant's petition for review DENIED.

LUCAS
Chief Justice

[May 16, 1990]

No. 0360-A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KINGS

In the Matter of the Application of

EUGENE HAMILTON, Petitioner,

For a Writ of Habeas Corpus.

ORDER GRANTING
PETITION FOR WRIT OF HABEAS CORPUS

The pertinent facts in this case are not in dispute and hence no evidentiary is required. *In re Hochberg* (1970) 2 Cal.3d 870, 874 n. 2. Petitioner, an inmate in the State prison was the subject of an administrative disciplinary proceeding for allegedly assaulting a prison staff worker. The hearing officer was Lieutenant Hopkins. Lieutenant Hopkins had previously, in the capacity of supervisor of the reporting employee, reviewed the reporting employee's disciplinary report as provided by California Code of Regulations section 3312(d) and (e). At this previous review Lieutenant Hopkins changed the charges against petitioner to reflect the proper charge in accordance with the incident as reflected in the report.

Respondent concedes that petitioner is entitled to a hearing in front of a neutral hearing officer. Respondent contends that because Lieutenant Hopkins was only "tangentially involved" in the bringing of the charges in question she was not precluded from being the

hearing officer *Meyers v. Alldredge* (3rd Cir. 1974) 492 F.2d 296 at 306.

Clutchette v. Procunier (9th Cir. 1974) 497 F.2d 809, 820 states that one, such as Lieutenant Hopkins, who participates in the case as a reviewing officer is not such a neutral and detached person as is required to be the hearing officer. The petition for writ of habeas corpus is therefore granted.

IT IS ORDERED that Respondent set aside its findings made at the disciplinary hearing in question. If Respondent desires to conduct a new disciplinary hearing it shall be held timely and before a neutral and detached official who has not participated in the review of investigation of the case. If no such new disciplinary hearing is held or if one is held and the charges not be found true, all disabilities suffered by petitioner as a result of the prior disciplinary hearing, including lost time credits which he would otherwise have been eligible to earn or receive shall be restored to him.

Dated: May 16, 1990

(SIGNATURE)
PETER M. SCHULTZ
Judge of the Superior Court

CALIFORNIA CODE OF REGULATIONS
TITLE 15

§ 3312. Disciplinary Methods.

Inmate behavior requiring disciplinary action shall be handled in one of the following ways:

(a) Verbal Counseling. Misbehavior of a minor nature may be handled by any employee who observes or has knowledge of the misbehavior, by verbal counseling and instruction. When verbal counseling and instruction appears to have achieved the desired corrective action it is not necessary to make a written report of the behavior nor of the counseling.

(b) Recorded Counseling. When verbal counseling and instruction of an inmate has not achieved the desired corrective action, or when repetition of the same or similar misbehavior may lead to formal disciplinary actions, such misbehavior and the counseling shall be recorded on a CDC Form 128-A, Custodial Counseling chrono, and placed in the inmate's central file. When the misbehavior includes the inmates involvement in contraband, the chrono shall include a description of the disposition of the contraband item(s). The inmate shall be informed that a report will be written and shall be given a copy when the original is routed for filing.

(c) Rule Violation Report. When an employee observes or discovers an inmate's misbehavior which is believed to be a violation of law, rules or approved procedures and the misbehavior is not of a minor nature that can appropriately be handled by counseling the inmate, with

or without a counseling report, the inmate's behavior will be reported on a Rule Violation Report, CDC Form 115.

(d) Rule violation reports, CDC Form 115, shall normally be prepared and submitted by the reporting employee in sufficient time to permit the report to be reviewed by supervisory staff, classified according to the seriousness of the charge, and for a copy to be given to the inmate within 24 hours of the inmate's act of misbehavior or discovery of same. In any event, the report shall be submitted in sufficient time to permit its review and classification and for a copy to be given to the inmate within 15 days after the discovery of information or evidence for the charge or in the case of an escape, notice shall be given within 15 days of the inmate's return to the custody of the department.

(e) Supervisory Review. All disciplinary reports, including counseling reports and rule violation reports are subject to review by the reporting employee's supervisor. This supervisory review must not delay the meeting of prescribed time limits for subsequent action in the disciplinary process.

(f) Approval of Disciplinary Methods and Actions. All disciplinary methods and actions are subject to the approval of the warden or superintendent. The warden, superintendent, or designate upon his or her own motion, or upon the recommendation of staff, or upon an inmate's request or appeal; may set aside any disciplinary action, order a different action, order a different method of discipline, dismiss a disciplinary charge, order a disciplinary hearing to be reheld, or any combination of these actions. Except upon the discovery of new

information or evidence which was not available or reasonably discoverable at the time of a disciplinary action, an order for the employment of a different method of discipline or for a rehearing of disciplinary charges ;may not result in any greater penalty or more severe action than was originally taken.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2932 and 5054, Penal Code.

§ 3313. Classification of Rule Violation Charges.

(a) An employee's completed report of a rule violation, CDC Form 115, will be submitted to a designated staff member at not less than the level required to conduct disciplinary hearings. Designated staff will classify rule violation reports according to the apparent seriousness of the inmate's alleged behavior. Reports will be classified as either an ADMINISTRATIVE (minor) violation or as a SERIOUS violation in accordance with the guidelines provided in Sections 3314 and 3315. The classification of a rule violation report will determine the procedures to be followed in preparing for and in conducting a disciplinary hearing and the range of action that may be taken if the inmate is found guilty of the charges.

(b) A copy of the rule violation report, CDC Form 115, classified according to the seriousness of the charges, will normally be given to the inmate within 24 hours of the alleged misbehavior or discovery of the same. A copy of the report must be given to the inmate within five days after the alleged misbehavior or discovery of same.

(c) Failure, for any reason, to give the inmate a copy of the rule violation report within 15 days after discovery of

the inmate's return to the custody of the department after an escape shall bar the loss of time credits as a penalty for the violation. Failure to give a copy of the report to the inmate within 15 days shall not act as a bar against authorized disciplinary actions unless the chief disciplinary officer determines that the delay is excessive and deprives the inmate of his or her rights or other necessary elements of a fair hearing on the charges.

(d) The chief disciplinary officer or the staff member who initially classified a rule violation report according to the apparent seriousness of the charges may change the classification of the report before a hearing is held. The official conducting the disciplinary hearing may change a SERIOUS classification to an ADMINISTRATIVE classification as a finding of the hearing. The warden or superintendent may change a SERIOUS classification to an ADMINISTRATIVE classification before or after a hearing is held. An ADMINISTRATIVE classification may not be changed to a SERIOUS classification after an ADMINISTRATIVE violation hearing has been held except upon the order of the warden, superintendent, or the director for a rehearing of the charges as a SERIOUS violation. A rehearing will provide the inmate with all rights and procedural safeguards of a SERIOUS violation hearing. An order for a rehearing will be in writing and will include the reasons for the order. A copy of the order will be given to the inmate.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2932 and 5054, Penal Code.

§ 3314. Administrative Rule Violations.

(a) Inmate misbehavior shall be classified as an administrative rule violation if the misconduct is of a minor nature, presenting no threat of physical injury, breach of institution security, introduction of dangerous contraband, or loss of property in excess of $50. A felony offense shall not be classified as an ADMINISTRATIVE rule violation. ADMINISTRATIVE rule violations include but are not limited to:

(1) Petty theft or unauthorized acquisition or exchange of personal or state property.

(2) Destruction or misuse of state property valued at $50 or less.

(3) Possession of otherwise approved property, materials, items or substances in excess of authorized limits.

(4) Possession of property, materials, items, or substances not authorized by the institution's approved property list presenting no threat to security, as described above.

(5) Misuse of food.

(6) Tattooing.

(7) Out-of-bounds not presenting a threat to security, as described above.

(8) Misuse of telephone privileges presenting no threat to security, as described above.

(9) Violations of mail regulations or procedures presenting no threat to security, as described above, including, the sending of disturbing or offensive correspondence, as described in Section 3135.

(10) Violations of visiting regulations or procedures presenting no threat to security, as described above.

(11) Failure to meet work or program expectations which are within the inmate's abilities.

(12) Reporting late to or failure to attend a work or program assignment.

(13) Participating in gambling.

(14) Use of vulgar or obscene language.

(15) Failure to follow a temporary community leave or re-entry itinerary.

(16) Being under the influence of alcoholic beverages, drugs, or intoxicants in a re-entry facility.

(b) An ADMINISTRATIVE rule violation will be heard by a disciplinary hearing officer. The inmate does not have the right to call witnesses, or to have an investigative employee assigned. As deemed necessary by the hearing officer, the inmate may be given staff assistance, as described in Section 3318.

(c) The disciplinary hearing officer may find the inmate guilty if the facts support the charge, or may dismiss the matter if the facts do not support the charge. In addition, the disciplinary hearing officer may find the inmate guilty of the charge but, in the interest of justice or because of other extenuating circumstances, dismiss the formal disciplinary charge and report the inmate's misbehavior on a CDC Form 128-A as a disciplinary counseling, as described in Section 3312. If treated as counseling, the rule violation report, CDC Form 115, will be disposed of as indicated in Section 3326. When, in the fact-finding phase of an ADMINISTRATIVE violation hearing, the violation is determined to be more serious than is appropriate for an ADMINISTRATIVE violation hearing, the disciplinary officer will terminate the

ADMINISTRATIVE violation hearing and have the matter rescheduled for a SERIOUS violation hearing.

(d) If the inmate is found guilty of an ADMINISTRATIVE violation, one or more of the following authorized dispositions may be made:

(1) Counseling, with or without a reprimand.

(2) Temporary suspension of a designated privileges for a period not to exceed 30 days from the date the inmate is or was deprived of the privilege.

(3) One or more weekend or holiday lockups not to exceed a total of 10 days; may not be imposed in addition to (5).

(4) Assignment to extra duty, not to exceed 40 hours.

(5) Confinement to quarters, for a period not to exceed five days. Inmates shall be released to go to work and program assignments.

(6) Placing a restriction on trust account withdrawals for canteen violations, or for violations involving the deliberate destruction, damage or misuse of state property when the inmate refuses to pay for the cost of repair or replacement of such property, as described in Section 3090.

(7) Suspension of all or part of any authorized disposition for a period not to exceed 90 days pending the inmate's acceptance and compliance with all specific conditions established for suspension of sentence.

(8) Invoke all or part of a currently suspended disposition for a previous violation when the finding on the current violation also constitutes a finding of violation of the conditions established for the previously suspended sentence.

Note: Authority cited: Section 5058, Penal Code.Reference: Section 5054, Penal Code.

§ 3315 Serious Rule Violations.

(a) Inmate misbehavior shall be classified as a SERIOUS rule violation if the act or action of the inmate is an act of force or violence against another person, a breach of or presenting a threat to institution security, a serious disruption of institution operations, the introduction or use of dangerous contraband or controlled substances or is an attempt to commit any such act coupled with a present ability to carry out the threat or attempt if not prevented from doing so. SERIOUS rule violations include but are not limited to:

(1) Any act for which the inmate could be prosecuted for a felony, whether or not prosecution is undertaken.

(2) Any act for which the inmate could be prosecuted for a misdemeanor whether or not prosecuting is undertaken.

(3) Any act of misconduct which is reportable to any parole board or releasing authority.

(4) Intentional destruction of state property valued at $50 or more, or intentional damage to state property requiring more than $50 to repair or replace.

(5) Hideout or preparation to escape.

(6) Possession of escape paraphernalia.

(7) Possession of money in an amount of five dollars or more without proper authorization.

(8) Acts of disobedience or disrespect which by reason of intensity or context create a potential for violence or mass disruptive behavior.

(9) Willfully inciting or attempting to incite other persons to commit an unlawful act of force or violence.

(10) Refusal or failure to perform work or participate in programs as ordered or assigned.

(11) Participation in a strike or work stoppage.

(12) A pattern of Administrative rule violations indicating significant maladjustment, which are of increasing seriousness or are of special significance in light of an existing release date.

(13) Mail or visiting violations that create a threat to the safety of any individual or to institutional security, including the introduction of dangerous contraband or a controlled substance, or the obtaining or attempt to obtain a family visit by falsification of information.

(14) The throwing of any liquid or solid substance on a non-prisoner.

(15) Unauthorized possession of official departmental records or documents which could affect any prisoner's sentence.

(16) Refusal to submit to a test for controlled substances.

(17) Late return or failure to return from authorized temporary release.

(18) Involvement in a conspiracy to do any or all of the above.

(b) An inmate charged with a serious rule violation may be subject to the following actions:

(1) Immediate segregation from the general inmate population pending preliminary investigation of the charge, subject to the provisions of sections 3317 and 3335 of these regulations.

(2) Classification review of segregated status pending a disciplinary hearing on the charge(s) when a disciplinary hearing is not held prior to the next scheduled meeting of the classification committee.

(3) Referral to the district attorney for possible criminal prosecution when the misbehavior is a criminal offense.

(4) A disciplinary hearing on the charge(s) and imposition of one or more of the following dispositions if found guilty as charged:

(A) Any penalty authorized for an administrative rule violation as set forth in section 3314 of these regulations. Designated privileges may be temporarily suspended for up to 90 days from the date the inmate is or was deprived of the privileges.

(B) Confinement to regular quarters or to a disciplinary detention unit for a period not to exceed 10 days, or for a longer period of time with prior approval of the director. An inmate may be released to go to work and program assignments if such release will not jeopardize institution security.

(C) Denial of credit on term of imprisonment for specific acts of misbehavior, as set forth in section 3323 of these regulations.

(5) Referral to a classification committee and classification committee actions resulting in one or more of the following:

(A) Reaffirmation of previously prescribed custody classification and work, program and housing assignments.

(B) Realignment of previously prescribed custody classification and work, program and housing status, which may include placement in zero credit earning status.

(C) Transfer to another institution or facility of the department.

(D) Placement in specialized housing unit for management or security purposes.

(E) Referral to the Board of Prison Terms or to the Narcotic Addict Evaluation Authority for release reconsideration, as provided in section 3324 of these regulations.

(c) Serious rule violations shall be heard by an institution disciplinary committee, disciplinary subcommittee or a senior disciplinary hearing officer at the level of program administrator, captain, correctional counselor III, experienced lieutenant, or correctional counselor II.

(d) The inmate may elect to be assigned an employee to assist in the investigation, preparation or presentation of a defense at the disciplinary hearing if it is determined by the chief disciplinary officer that:

(1) The inmate is illiterate; or

(2) The complexity of the issues makes it unlikely that he or she can collect and present the evidence necessary for an adequate comprehension of the case; or

(3) The inmate's housing status makes it unlikely that he or she can collect and present the evidence necessary for an adequate comprehension of the case. An assigned employee shall provide assistance as described in Section 3318.

(e) An inmate may request friendly and adverse witnesses to attend the hearing. Witnesses shall be called unless the person conducting the hearing denies the request for one of the following reasons: endangerment of the witness; determination that the witness has no relevant

information; the witness is unavailable. If an inmate's request for a witness is denied, the reasons shall be documented on the CDC Form 115. Whether or not the inmate requests a witness for a hearing, a witness may be called if the person conducting the hearing determines the witness may have information necessary to the finding of fact. The reporting employee with relevant information shall attend if requested by the inmate. Under the direction of the person conducting the hearing, the inmate has the right to ask questions of all witnesses called. Nothing in this section shall preclude making a witness available for a hearing by telephone.

(f) Upon completion of the fact-finding portion of the hearing, and based upon information presented in the disciplinary report and in the hearing, the following actions may be taken:

(1) The inmate may be found not guilty and the charges dismissed.

(2) The inmate may be found guilty of an ADMINISTRATIVE level violation rather than a SERIOUS level violation and the disciplinary report reclassified accordingly, with the inmate assessed an authorized ADMINISTRATIVE level disposition as provided in Section 3314.

(3) The inmate may be found guilty as charged and assessed an appropriate ADMINISTRATIVE level or a SERIOUS level disposition.

(4) All or part of any disposition except the denial or forfeiture of credits on term of imprisonment may be suspended for a period not to exceed six months pending the inmate's acceptance and compliance with all specified

conditions established for suspension of sentence. A disposition denying or forfeiting credit on term of imprisonment shall not be suspended.

(5) Any currently suspended disposition for a previous violation may be invoked when the finding of fact on the current violation also constitutes a violation of the conditions established for the previously suspended sentence. In invoking the current and any previously suspended disposition, confinement to quarters or to isolation status shall not be for longer than 10 days except as provided in Section 3322.

(g) Any serious misbehavior or refusal or failure to participate resulting in loss of credits, or which for any other reason requires reconsideration of previously prescribed work, program, or housing assignments, shall be referred to a classification committee for review. The classification committee shall affirm, reverse or modify the credit loss of action of a disciplinary hearing. The classification committee's review of a credit loss shall occur at the committee;s next scheduled meeting following disciplinary action. The classification committee's review of any disciplinary credit loss action shall take the place of any subsequent first level of appeal review.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2931, 2932, 2933, 5054 and 5068, Penal Code.

§ 3318 Assistance to Inmates in Disciplinary Proceedings.

(a) Investigative Employee. In the case of a serious rule violation, an investigative employee may be assigned, under the criteria of Section 3315(d), within one working day after the charges have been submitted for processing. The investigative employee shall gather information, question staff and inmates, screen prospective witnesses and complete and submit a written report to the senior disciplinary hearing officer or chairperson of the disciplinary committee hearing the charges. If a determination has been made that additional information is necessary for a fair hearing, an investigative employee shall be assigned even if the inmate has waived the assignment. A copy of any investigative employee's report shall be given to the inmate no less than 24 hours before a hearing is held. The inmate may not select the investigative employee, but may object to the one assigned, in which case, a different investigative employee shall be assigned. The inmate's objection must be expressed prior to the beginning of the investigation. An employee who witnessed the charged rule violation or who would otherwise serve as a disciplinary hearing officer or a member of a disciplinary committee hearing the case shall not serve as the investigative employee on the same case. The assignment of an investigative employee shall not preclude the assignment of a staff assistant as described in subsection (b).

(b) Staff Assistant. In the case of a serious rule violation, the chief disciplinary officer shall notify the

inmate that in addition to any of the reasons set forth in Section 3315(d) the inmate is entitled to staff assistance when the chief disciplinary officer determines that the nature of the inmate's need for assistance will require a confidential relationship as described in subsection (b)(2) for the preparation and presentation of the inmate's defense.

(1) An inmate may refuse to accept the assistance of the first staff member assigned at the time of assignment or for good cause as determined by the chief disciplinary officer or designate, at any time during the disciplinary process. If staff assistance is refused at the time of initial assignment of a second staff member shall be assigned if requested by the inmate. An inmate's refusal to accept the second staff member's assistance or a withdrawal of acceptance after accepting an assigned staff member's assistance shall not require the assignment of another staff member unless the chief disciplinary officer or designate determines that a fair hearing cannot be held without staff assistance.

(2) Upon assignment, the staff assistant shall inform the inmate of his or her rights and the procedures to be followed in disciplinary proceedings. The staff assistant shall then advise and assist the inmate in preparing for a disciplinary hearing, represent the inmate's position at the hearing, ensure that the inmate;s position is understood, and that the inmate understands the decisions reached. Staff shall not give legal counsel nor specify the position the inmate will take in any disciplinary, classification or criminal proceedings. The assigned staff assistant shall inform the inmate that the staff assistant will, upon the

inmate's request, maintain confidentiality of information the inmate may disclose to the staff assistant concerning the inmate's past conduct, but that information about future criminal conduct may be disclosed to appropriate authorities as provided in subsection (3).

(3) If the staff assistant becomes aware that the inmate is contemplating future criminal conduct, the staff assistant shall counsel the inmate to refrain from such conduct. If the staff assistant believes that such counsel has not been accepted by the inmate, the staff assistant shall disclose such information as is necessary to protect possible victims and prevent the contemplated crime.

(4) The staff assistant shall inform the inmate that all evidence and information obtained and considered or developed in the disciplinary proceedings may be used in court if the same charges have been or are to be referred to the district attorney for possible criminal prosecution.

(5) The assignment of a staff assistant shall not preclude the assignment of an investigative employee. When an investigative employee provides assistance to an inmate, in lieu of an assigned staff assistant, the investigative employee shall do so as a representative of the official who will conduct the disciplinary hearing rather than as a representative of the inmate. An investigative employee is not subject to the provisions for confidentiality of information as described in subsection (b)(2). Any investigative report shall be nonconfidential.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2932 and 5054, Penal Code.

§ 3320. Hearing Procedures and Time Limitations.

(a) The rule violation report, CDC Form 115, and all nonconfidential reports to be relied upon in a disciplinary hearing shall normally be given to the inmate within 24 hours after the report has been classified as a SERIOUS or ADMINISTRATIVE violation, and within 30 days of the misbehavior but not later than 15 days from the date of discovery of information leading to the disciplinary charges or, in the instance of an escapee, 15 days after the escapee's return to custody of the department.

(b) A hearing on the charges shall be held within 30 days from the date the inmate is given a copy of the rule violation report unless a case has been referred to criminal authorities for possible prosecution and the inmate has requested and been granted a postponement of disciplinary proceedings pending the outcome of such referral.

(c) The following events shall act as a bar against denial or forfeiture of good behavior and participation credits:

(1) Failure to give the inmate a copy of the rule violation report within 15 days after the discovery of information leading to the disciplinary charges;

(2) Failure to establish the fact that information or evidence for the rule violation report was not reasonably discoverable within 30 days or any sooner than it was discovered when the inmate is not given a copy of the rule violation report within 15 days after the alleged misbehavior took place.

(3) Failure to hold a hearing on the disciplinary charges within 30 days of the date the inmate was given a copy of the rule violation report. An exception to this time limit

is provided in Section 3316 when the case has been referred to criminal authorities and the inmate has requested and been granted a postponement of the disciplinary hearing pending the outcome of the referral.

(4) Failure to hold a hearing within 30 days after the date notice is received of the outcome of a referral to criminal authorities, or within 30 days from the date the inmate revokes his/her request for the postponement of a hearing on the disciplinary charges if criminal authorities have not filed an accusatory pleading against the inmate.

(5) Failure to provide the inmate with a written explanation of the extraordinary circumstances which have prevented a disciplinary hearing from being conducted within 30 days of the date the inmate is given a copy of the disciplinary charges, and of a determination that the delay does not prejudice the inmate.

(d) Except as required by the Penal Code for an action delaying or forfeiting credit on a determinate term of imprisonment, the maximum time limits set forth in this section shall serve only as guidelines for the processing of rule violation reports for which other disciplinary actions may be taken. Where the rules and regulations of the director provide for lower time limits, the lower limits shall apply.

(e) A disciplinary hearing will not be held until the inmate has been given a copy of the rule violation report, CDC Form 115, and all nonconfidential reports to be relied upon in the hearing, including the investigative employee's report, and the inmate has had at least 24 hours to review the material and prepare for the hearing. The hearing may be held earlier upon the inmate's waiver

of the full 24 hour preparation period. A hearing may be postponed up to 30 days upon a written request of the inmate and a showing of reasonable need for postponement of the hearing.

(f) An inmate may, upon written notice, waive the right to be present at any disciplinary hearing of charges against the inmate. In the absence of a waiver, the inmate will be present at a disciplinary hearing unless:

(1) A psychiatrist has determined that the inmate suffers from a severe psychiatric disorder which will prevent the inmate from understanding or participating in the hearing, and there is a compelling reason or need to proceed with the hearing.

(2) The inmate is an escapee who has been found guilty of escape in a court of law and the inmate has not been returned to the institution or jurisdiction from which the escape occurred.

(3) In all cases where a hearing is held without the inmate being present, the reason for the inmate's absence will be documented on the rule violation report at the time of the hearing.

(g) Employees who reported the rule violation, or who supplied supplemental reports to the rule violation report, or who observed the alleged violation, or investigated the alleged misbehavior or assisted the inmate in preparing for the hearing, or for any other reason have a predetermined belief that the inmate is guilty or innocent will not sit as a fact finder in a disciplinary hearing nor be present while the fact finders are conducting deliberations to decide guilt or innocence and the appropriate disposition if the inmate is found guilty.

(h) Transferred witnesses. An inmate witness shall not be transferred between institutions to testify at disciplinary hearings unless the chief disciplinary officer (CDO) of the institution hearing the charges determines a fair and impartial hearing cannot be conducted without the inmate's witness being present. When an inmate is not available due to transfer, the CDO of the institution where an inmate witness is located shall be notified of the need to appoint an investigative employee to discuss the case with the investigative employee of the institution conducting the hearing, to interview the witness, to prepare a written investigative report, and to forward the report to the institution where the hearing will be conducted.

(i) When an inmate, whose disciplinary charges are being adjudicated, is ordered to leave the hearing room, all witnesses, including staff witnesses, shall leave the room.

(j) When a serious rule violation occurs during the transportation of an inmate, transporting staff witnesses shall be present at the hearing if requested, or shall be telephonically available for questioning during the hearing.

(k) The inmate may present documentary evidence in defense or mitigation of the charges. A finding of guilty shall be based upon a determination by the person(s) conducting the hearing that a preponderance of the evidence submitted at the hearing substantiates the charge. At the end of the hearing, the inmate shall be advised of the findings, the disposition of the charge and the right to and procedure for appeal of the action. Within five working days, the inmate shall be given a copy of the completed CDC Form 115, Rule Violation Report,

containing the findings, disposition, and evidence relied upon to support the conclusions.

(l) When an inmate is charged with possession of unauthorized or dangerous items or substances, or when unauthorized or dangerous items or substances are associated with the commission of the charged violation, the hearing officer shall record the disposition of the item or substance in the disposition portion of the CDC Form 115, Rule Violation Report.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2932 and 5054, Penal Code.

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California Department of Corrections

ADMINISTRATIVE BULLETIN

Subject: DISCIPLINARY HEARINGS/BARRINGS OF FACT-FINDERS

No. 87/83
Date: November 2, 1987

The purpose of this bulletin is to clarify the intent of California Administrative Code (CAC), Title 15, Section 3320 (g) which describes those persons who may not sit as fact-finders in a disciplinary hearing.

CAC, Title 15, Section 3320(g) states:

> "The employees who reported the rule violation, or who supplied supplemental reports to the rule violation report, or who observed the alleged violation, or investigated the alleged misbehavior or assisted the inmate in preparing for the hearing for the hearing, or for any other reason have a predetermined belief that the inmate is guilty or innocent will not sit as a fact-finder in a disciplinary hearing nor be present while the fact-finders are conducting deliberations to decide guilt or innocence and the appropriate disposition if the inmate is found guilty."

This section shall not be interpreted as applying to the

following unless, while performing any of these functions, the inmate or staff involved in the disciplinary matter reveal information pertinent to the ensuing investigation:

1. Hearing Officers who act as the initial classifier of a rules violation report; or

2. Hearing Officers who, in the performance of their duties as Unit/Program Lieutenants, sign the CDC 114-D (Order and Hearing on Segregated Housing) which orders an inmate's placement in administrative segregation as a result of a disciplinary matter; or

3. Any individual who, in the normal performance of his/her duties, is required to perform a supervisory review of rule violation reports for compliance with Department policy and procedures.

Please see that all personnel concerned are informed of the contents of this bulletin.

This bulletin remains in effect until contents are incorporated into departmental manuals. For further information, please contact Alberta Hein, Institution Services Unit, at (916) 324-3926 or ATSS 454-3926.

JAMES H. GOMEZ
Chief Deputy Director